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IN THE

Supreme Court of the United States

October Term, 1965.

No. 799.

CLEMENT V. CONOLE, CHARLES E. ANABLE, RICHARD C. CONOLE, BRIDWELL W. LINCOLN, WILLIAM J. CALLAHAN and ALVA M. MEYERS,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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1. The Solicitor General suggests (Br. in Opp., 6) that the petition for a writ of certiorari in this case has been filed out of time. The basis for this contention is that the Rules of Criminal Procedure control and that, accordingly, this Court lacks jurisdiction to entertain the petition since it was not filed within thirty days from the date of final judgment in the court below.

There is no need to discuss, as an abstract matter, the nature of a contempt proceeding. This Court has treated such cases as civil proceedings for the purpose of the time limit stated in 28 U. S. C. § 2101. Thus, in **United States v. Shillitani**, 345 F. 2d 290 (C. A. 2), the final judgment of the Court of Appeals for the Second Circuit was rendered on May 18, 1965, and the petition for certiorari was filed on

July 31, 1965. 34 L. W. 3067. **United States v. Pappadio**, 346 F. 2d 5 (C. A. 2) was decided on May 23, 1965 and the petition for certiorari was filed on August 10, 1965. 34 L. W. 3072. The **Cheff** case was styled **In Re Holland Furnace Company** in the Court of Appeals for the Seventh Circuit and is reported at 341 F. 2d 548. The decision was rendered on January 27, 1965 and gave rise to two petitions for certiorari. The one involving Cheff was filed as **In Re Cheff** on April 8, 1965. 33 L. W. 3336.

This Court granted certiorari in all three cases on November 15, 1965. 382 U. S. 913, 916, 917. In other words, as stated above, this Court took the position that it had jurisdiction to entertain the petitions and grants the writs of certiorari. In all three cases, the petition was filed under the ninety day rule, not under the thirty day rule.

2. As the petition makes clear (Pet., 9, 11-15), a special duty is cast upon a reviewing court in criminal contempt cases where punishment has been imposed. Central to this duty is the task of ascertaining whether or not the charge has been proved beyond a reasonable doubt. It is petitioners' position that the court below did not even attempt to discuss and resolve this issue, the principal issue presented by both parties on the appeal and in the trial court.

The Solicitor General seeks to continue this avoidance, describing the question as merely one involving "* * * the sufficiency of the evidence * * *" but goes on to state, somewhat inconsistently, that the central issue turned "* * * upon the credibility of the witnesses and had been resolved against petitioners by the trial court on ample evidence. * * *" (Br. in Opp., 6).

There is no way of knowing whether the court below weighed the evidence under the applicable rules or whether it believed that credibility was the decisive factor. And, clearly, the record required fair discussion of the question. The petition makes clear that the overwhelming weight of the evidence, to which must be added a presumption of

innocence, was to the effect that Clement Conole stated, after service of the temporary restraining order, that voting would be conditional and that a majority of the directors heard him so state and acted accordingly (Pet. 5-6, 12-14).[1]

The meeting was confused and it is possible that Crandall and his associates, who stated that they did not hear Conole announce the condition, were telling the truth. The alternative to this assumption is that Crandall and his associates, not disinterested witnesses, were seeking to destroy Conole and the other majority directors, a step in a plan which Crandall had been carrying out over a period of time to gain control of Business Supplies Corporation. Evidence to this effect was rejected by the trial judge[2] and would, of course, have been entitled to great weight in passing on the credibility of the testimony of Crandall and the two directors who sided with him. The Solicitor General seemingly misses the point of the proffered evidence of plan, stating (Br. in Opp., 7) that such testimony would not have been relevant to the issue whether voting had been conditional or unconditional.

3. The Solicitor General asserts that the trial judge was not "personally embroiled in the controversy. * * *" (Br. in Opp., 7). The statement is not supported by reference to relevant portions of the record nor could it be. The petition sets forth in detail the facts which indicate the contrary (Pet. 18-19). Suffice it to say here that a charge, which should have been viewed as minor and technical at

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1. There is no warrant for the suggestion in the Brief in Opposition (p. 5) that Conole only assumed "* * * in his own mind * * *" that the voting would be conditional. Conole testified that he stated the condition and the other petitioners, the majority directors, all testified that they heard him so state and acted accordingly (Pet. 5-6).

2. The only reason assigned by the trial judge for the exclusion was the statement that he did not "* * * give a hoot * * *" about anything which took place prior to the day of the meeting in Bryn Mawr (111a).

most, was described by the trial judge as the "• • • most arrogant • • •" that he had ever heard of (419a). Following this ultimate characterization, the trial judge imposed fines which the court below, with very little discussion, found to be ten times too great.

4. We recognize, as shown in the petition (20-22), that this Court, by its actions last Term, distinguished between imprisonment imposed on an individual and a fine imposed on a corporation in criminal contempt proceedings. However, for the reasons set forth in the petition, we do not think it entirely settled that the imposition of a fine on an individual in punishment of criminal contempt should not be treated with the same gravity as the imposition of a sentence of imprisonment, particularly when note is taken of the consequences of the conviction itself.

CONCLUSION.

For the reasons set forth in the petition and in this reply, a writ of certiorari should be granted.

Respectfully submitted,

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